McGILL LAW JOURNAL
REVUE DE DROIT DE McGILL
Montréal
Volume 34 1989 *No 1*

The Administrative Law Scholarship of D.M. Gordon

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The best known contribution of D.M. Gordon's administrative law scholarship is his "pure" theory of jurisdictional review. The author contends that Gordon should be better understood as a distinctive and prolific pioneer of Canadian administrative law scholarship. In attempting to expound law in an autonomous and internally consistent fashion, Gordon is best understood as a thinker in the Rule of Law tradition. However, this intellectual framework did not lead Gordon to the hostility towards the administrative state exhibited by Dicey. Indeed, the bold distinctions Gordon drew between judicial and administrative functions, and between review of the scope of authority as opposed to the manner of its exercise, resulted in a very limited role for judicial review of administrative activity. Gordon's theories of judicial review exhibited over fifty years of scholarly activity are related to his understanding of law as based on internal logic and the dichotomies between law and politics and between adjudication and discretion. The author assesses Gordon's scholarship and its underlying premises and places Gordon's thought in its historical context.

La contribution de D.M. Gordon au droit administratif dépasse la « pure » théorie de la compétence. L'auteur étudie l'oeuvre et les prémisses de Gordon et les situe dans leur contexte historique. L'auteur soutient que Gordon fut un pionnier prolifique et original du droit administratif canadien. Parce qu'il tentait d'expliquer le droit d'une façon logique et cohérente, Gordon appartient proprement à la tradition de la primauté du droit. Mais cette appartenance ne l'a pourtant pas rendu hostile à l'émergence de l'état administratif contrairement à Dicey. En fait, Gordon soutient fermement la possibilité d'une distinction claire entre, d'une part, les fonctions administratives et judiciaires et, d'autre part, la politique et le droit. Ces distinctions entraînent un concept limité de l'erreur juridictionnelle qui est très favorable aux instances administratives.

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I. Iutroduction

The legacy of D. M. Gordon's administrative law scholarship consists of a few pesky footnotes concerning his "pure" theory of jurisdiction. This theory limits jurisdictional errors to decisions outside the scope of a tribunal's authority and does not include any errors made in the manner in which the authority is exercised. Yet Gordon should be better understood as a prolific and distinctive pioneer of Canadian administrative law scholarship. Starting in the 1920s and continuing into the 1970s, he published over eighty articles and notes in major British and Canadian legal journals. A practising lawyer from British Columbia, Gordon wrote in his role as part-time scholar with a fearless sense of mission in an effort to rationalize the manner in which courts intervened to review decisions made by administrative bodies and inferior courts. Gordon is intriguing in part because he was almost always out of step with both judicial and academic attitudes towards judicial review. He dismissed scores of cases in which courts had intervened out of "expedient" or "sympathetic" motives which he believed endangered the conceptual and logical coherence of the law and the promise it held as an objective means of discovering and enforcing pre-ascertained standards. Although Gordon was adept in recognizing and illustrating inconsistencies and anomalies in administrative law jurisprudence, he never

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shared the scepticism about the objectivity and autonomy of the judicial enterprise which realist legal scholars embraced. Moreover, Gordon never adopted the qualitative and policy-sensitive reasoning of various functionalist approaches to judicial review. Gordon will be presented in this paper as a legal thinker in an older tradition often associated with Dicey. Gordon's thought can be seen as an attempt to follow in the text-book tradition of the late nineteenth century which expounded law that aspired to be principled, objective, internally consistent and scientific.[1]

Although Gordon was a practising lawyer who received his training in a law office, he wrote his articles in no less than this grand text-book tradition pioneered by Dicey and his Oxford colleagues.[2] He ambitiously sought to identify a few general principles which would explain judicial review and provide an objective guide for its use. With Dicey, Gordon shared an ambition to be a theorist who demonstrated that a mass of isolated decisions could be regarded as illustrations of a few leading principles.[3] Gordon and

[1]In referring to the Rule of Law thought of Dicey and the text-book tradition, I am greatly indebted to the work of Professor David Sugarman. See generally D. Sugarman, "Legal Theory, the Common Law Mind and the Making of the Textbook Tradition" in W. Twining, ed., *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) and "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science" (1985) 46 Mod. L. Rev. 102. Other useful accounts of the form of classical legal consciousness dominant in the late nineteenth and early twentieth century are found in E. Mensch, "The History of Mainstream Legal Thought" in D. Kairys, ed., *The Politics of Law* (New York: Pantheon, 1982) at 23ff and D. Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940" in S. Spitzner, ed., *Research in Law and Sociology*, vol. 3, (Greenwich, Conn.: Jai Press, 1980) (Series ed.: R.J. Simon) at 3. Gordon became a lawyer in 1916 just as the reign of classical legal consciousness or Rule of Law thought waned, but his thought throughout the next five decades remained rooted in that intellectual framework.

[2]Gordon held legal scholarship in very high esteem and believed scholars had a crucial role to play in the development of law. In his first major article on jurisdiction, Gordon prefaced his analysis by noting: "There is no English textbook on jurisdiction. That want must have a bearing, either as cause or effect, on the fact that in no branch of English law is there more confusion and conflict." [Gordon, "The Relation of Facts to Jurisdiction" (1929) 45 L.Q. Rev. 459.] He repeated similar observations in other fields. See for example: Gordon, "Persona Designata" (1927) 5 Can. Bar Rev. 174; and, "Effect of Reversal of Judgement on Acts Done Between Pronouncement and Reversal" (1958) 74 L.Q. Rev. 517.

[3]A.V. Dicey, "*Droit Administratif* in Modern French Law" (1901) 17 L.Q. Rev. 302 at 312. For Gordon, the scholar was a potential Hercules who could bring out the coherent principles underlying the mass of case law. In his first article on jurisdiction he stated: "To segregate the logical from the sophistical throughout the whole field of jurisdiction would be a labour of Hercules, but what follows is an attempt to ventilate one of the worst corners of the Augean stable." [Gordon, "The Relation of Facts to Jurisdiction", *supra*, note 2 at 460.] Today this scholarly Hercules continues to strive towards the discovery of coherence in the law through the writings of Ronald Dworkin. For a provocative argument that Dworkin's Hercules is armed with distinctions between principles and policies, and judicial and legislative functions that would not be foreign to Dicey or, in my view, Gordon, see T.R.S. Allan, "Dworkin and Dicey: The Rule of Law as Integrity" (1988) 8 Oxford J. Legal Stud. 266.

Dicey both believed it was possible and desirable to reduce a branch of law "to a few logical principles by the books of well-known writers",[4] and they endeavoured to accomplish that task. Although based on the same intellectual framework, Gordon's thought did not demonstrate either the hostility towards the rise of the administrative state which made Dicey famous, or the ideological and historical consciousness which characterized much of Dicey's writings.

Rule of Law thought, with its celebration of the principles of legality and constitutionality, is today associated with extensive judicial intervention and hostility towards administrative activity, but Gordon's work suggests that such a reaction was not the only possible option within that intellectual framework. In the absence of statutory rights or explicit provisions for appeal, Gordon was willing to leave wide room for administrative bodies to make decisions without fear of judicial intervention arising from disagreements about the manner in which power was exercised. As a consequence, Gordon's doctrinal arguments more often than not came down on the side of unfettered administration. It will be suggested, however, that the results Gordon reached were the product of the epistemology of the Rule of Law tradition, and not of any articulate sympathy towards the developing administrative state.

The next two parts of this paper will outline Gordon's major contributions to administrative law scholarship and the understanding of law which underlies these doctrinal arguments. First, Gordon's limited concept of jurisdictional review will be examined. Gordon's thought relied heavily on a faith in self-executing concepts which left no room for dispute or the exercise of judgment. As a result, Gordon was vehemently opposed to judicial review on the basis of errors in determining jurisdictional facts, and he argued that neither the merits of a tribunal's decision nor the method by which the decision was made affected the tribunal's jurisdiction. Furthermore, Gordon rejected the concepts of natural justice, irrelevant considerations or reasonableness as stable and principled bases for judicial review. This understanding of jurisdictional review can best be explained by Gordon's understanding of statutory interpretation and his penchant for categorical reasoning.

The bold and confident distinction Gordon made between judicial and administrative functions then will be examined. Gordon's arguments were based on an understanding of adjudication as the objective recognition of pre-existing rights. This conception of adjudication stood in contrast to his understanding of administration and legislation as the arbitrary and subjective exercise of will which could not be judged or restrained by standards

[4]Dicey, "*Droit Administratif* in Modern French Law", *supra*, note 3 at 312.

of reasonableness. The dichotomy of adjudication and discretion produced a sometimes uneasy mixture of a sense of objectivism through judicial discovery of clear limits, as well as a sense of subjectivism and relativism through the exercise of unfettered discretion within those limits.

The fourth part of this paper will begin to place Gordon in historical context by comparing him to some of his contemporaries. Gordon's career spans the time of Dicey, the sociological jurisprudence of Pound and others, the realists, the policy-oriented, functionalist scholarship of the 1950s and the 1960s and the McRuer Commission. Gordon's intellectual framework was closest to that of Dicey and McRuer, but unlike them he refused to sacrifice the internal logic of principles to champion judicial review as a means to curb the administrative state and impose the values of the ordinary courts. The insights of sociological, realist and functionalist jurisprudence were apparently lost on Gordon, but it is significant that he could tolerate their frank recognitions of unguided judicial and administrative discretion more than he could their attempts to make legal concepts qualitative and purposive.

The last part of this paper will concern the strength and weakness of Gordon's thought with an eye to both the past and present. The solitary echo of Gordon's voice was not inevitable. Gordon's arguments left much room for the development of the administrative state and they appealed to deep strands in Rule of Law thought concerning Parliamentary supremacy and the dichotomies between adjudication and discretion and between law and politics. On the other hand, Gordon's arguments hold out an extremely modest, even impoverished, understanding of the role of law in the control of administrative activity. Gordon maintained his faith in principled and objective law while Dicey and others yielded to the temptation to celebrate even haphazard review by ordinary courts. For those who came after Dicey, Gordon's neat logical arguments seemed unrealistic. However, they still invoked respect in the profession's "logical conscience".[5] Gordon's understanding of law continued to have a hold on lawyers' minds even after they began to see judicial review more as a purposive instrument than as a conceptual construct.

[5]Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (London: MacMillan, 1905) at 362. Dicey used this phrase to describe the character of "judicial legislation". Many leading text-books continue to pay their respects to the logic of Gordon's "pure" theory of jurisdiction. See P.P. Craig, *Administrative Law* (London: Sweet & Maxwell, 1983) at 304-7; S.A. de Smith, *Judicial Review of Administrative Action*, 4th ed. by J.M. Evans (London: Stevens, 1980) at 110-19; J.M. Evans *et al*, *Administrative Law Cases, Text and Materials*, 2d ed. (Toronto: Emond Montgomery, 1984) at 512-3; S.D. Hotop, *Principles of Australian Administrative Law*, 6th ed. (Sydney: Law Book Co., 1985) at 250; and H.W.R.Wade, *Administrative Law*, 5th ed. (Oxford: Clarendon Press, 1982) at 267-70.

Questions remain whether Gordon's warnings about the limits of "principled" law in the administrative process should be heeded, and whether the analogy he made between the role of administrative bodies to that of legislatures may be particularly appropriate in a Canadian political culture which embraces the positive state and is capable of great deference to the ability of public authority to determine the public interest. In that light, Gordon's provocative analogy of administration to legislation may be attractive, and his narrow vision of jurisdictional review useful. Those who have greater ambitions about the ability of the law to supervise administration will continue to have to endure criticisms that the reasoning reached by courts is not as logical, consistent or as clearly principled as those offered by Gordon. Doctrinal coherence, at the level to which Gordon aspired, comes at a price that most are unwilling to pay: jurisdiction is only an external constraint on power which does not allow courts to consider either the manner in which administrative bodies make their decisions or the quality of those decisions.

II. A Limited Concept of Jurisdictioual Review

Gordon's administrative law scholarship consisted of exposition and analysis of the reasons courts gave to justify their review of decisions of inferior tribunals and administrative bodies. Gordon was highly critical of most of the reasons now accepted as justifications for judicial review. Intervention on the basis of violation of natural justice, consideration of extraneous factors, lack of evidence, unreasonable findings or error in assessing preliminary jurisdictional facts, were all unacceptable to Gordon. Moreover, he was impatient with judicial rhetoric, now often associated with the Rule of Law, which suggested that such flexible and expansive forms of review were necessary if tribunals were not to be "autocratic".[6] Gordon took issue with such sentiments because he believed they clouded a proper understanding of legal principles and statutory language.

Gordon was attracted to what he believed was a conceptual coherence inherent in the doctrine of jurisdictional review. He conceived jurisdiction

[6]Gordon repeatedly criticized the influential attempt of Farwell L.J. to equate expansive notions of jurisdictional review with the very notion of limited power. Farwell had asserted:

> No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court ... it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure — such a tribunal would be autocratic, not limited. [*R. v. Shoreditch Assessment Committee*, [1910] 2 K.B. 859 (C.A.) at 880, quoted and criticized in Gordon, "The Relation of Facts to Jurisdiction", *supra*, note 2 at 473-4.]

Gordon responded to Farwell's rhetoric by commenting: "This antithesis of 'autocratic' and 'limited' tribunals seems neither very happy nor scientific." [Gordon, *ibid.* at 474 n.61.]

as the scope of authority to decide certain questions. The scope of authority was absolutely divorced from questions about the manner in which those questions had been answered, or from the merits of such decisions. Concepts such as scope and manner had an inherent meaning for Gordon, part logical and part semantic. For example, it was "a logical impossibility for the legislature ever to create a procedural condition of jurisdiction in the true sense", in part because it would be

> stultifying itself by talking nonsense and showing that it did not understand the English language. It would be using the words 'outside the scope of his duties' to mean no more than 'contrary to his duty' whereas they mean a great deal more.[7]

Such reasoning seems tautologous today, but for Gordon it was a recognition of logical principles and coherent conceptual distinctions which should be used to decide difficult questions.

The difference between a body operating with or without jurisdiction was an absolute binary distinction according to Gordon. This distinction left no room for questions of degree:

> Jurisdiction must be an absolute conception ... . If an essential is wanting, jurisdiction is not defective; it simply does not exist. For it must exist in all perfection, or not at all; a relative want of jurisdiction is nonsense.[8]

Gordon ridiculed concepts of "a sort of evanescent jurisdiction",[9] in large part because no bright line could define the point at which jurisdiction was lost because of error or misdirection in the answering of assigned questions.[10]

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[7]Gordon, Case Comment on *Ohene Moore* v. *Akesseh Tayee* (1935) 13 Can. Bar Rev. 523 at 528-9.

[8]Gordon, "The Observance of Law as a Condition of Jurisdiction" (1931) 47 L.Q. Rev. 386, 557 at 574. Gordon used the same absolutist reasoning to argue that a defect in jurisdiction has "no intelligible meaning unless it denotes a partial want of jurisdiction, which only seems to be possible when a tribunal deals with a subject-matter severable in its parts." [Gordon, Case Comment on *Toronto Newspaper Guild* v. *Globe Printing Co.* (1953) 31 Can. Bar Rev. 1158 at 1160.]

[9]Gordon, "The Relation of Facts to Jurisdiction", *supra*, note 2 at 466.

[10]Gordon asked the following rhetorical question based on the assumption that bright lines should emerge and bring a self-executing quality to legal concepts:

> If jurisdiction, once accrued, can be taken away by evidence subsequently given, at what stage will the ouster take effect? Will the first evidence against the essential facts oust so thoroughly that further evidence the other way cannot be given? Or will more affirmative evidence restore the lost jurisdiction? And what if neither kind of evidence is conclusive? [Gordon, "The Relation of Facts to Jurisdiction", *supra*, note 2 at 476 n.75.]

Those who did not share Gordon's assumptions about law being an exact science would not be troubled by such questions.

Later in his career, Gordon backed away from this bright line argument that the taking of evidence could not affect jurisdictional authority, and approved the Supreme Court's finding

Either the findings of the tribunal matched the scope of the powers defined in the statute or they did not. Jurisdiction was not defined as a sphere with a centre, a periphery and a border, but rather a tightly bound area which left no room for an "undistributed middle".[11] Even the analogy of jurisdiction to an area of property could not force Gordon to admit courts had to judge questions of degree on the borders. One step in any direction off an undifferentiated area defining the scope of power made a tribunal a trespasser. Gordon criticized all forms of judicial review which relied upon qualitative distinctions, and he sought out self-executing principles which would draw sharp lines of distinction.

Gordon's understanding of jurisdictional review reflected his belief in the objective nature of statutory interpretation and his belief in the ability of words, when properly used, to delineate clearly the scope of a body's authority to make decisions. Words were capable of accurately and objectively defining the scope of a tribunal's power, and problems would only arise from "vague and unscientific wording of statutes".[12] Jurisdiction acted as a metaphor for law to Gordon because it was definite and certain. Jurisdictional errors were objective in the sense that they did not depend on any party being prejudiced and making objections; they only depended on a violation of the grammar and logic of the words of the enabling statute. Jurisdiction could be determined at the outset and apart from the manner of its exercise because it involved only a matching of the objective definition of powers in the enabling statute with the form and external shape, but not the internal merits, of the answer the tribunal provided to the proper question.

Gordon's resistance to expansive forms of jurisdictional review also can be understood in the context of the importance of categorical reasoning to his understanding of law. In Gordon's mind, logical concepts were either self-evidently distinct or completely merged. A true conceptual distinction defined two mutually exclusive areas or it was no distinction at all, only an unscientific, illogical and unhelpful "pseudo-conception".[13] True concepts

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of jurisdictional error in a Labour Board's refusal of evidence. Nevertheless he continued to worry that the decision might "set up a line of distinction between error and refusal of jurisdiction that is both hard to define precisely and hard to apply with certainty in practice." [Gordon, Case Comment on *Toronto Newspaper Guild* v. *Globe Printing Co.*, *supra*, note 8 at 1162.] See also *infra*, note 57 and accompanying text, for a discussion of Gordon's political views.

[11]Gordon, "The Observance of Law as a Condition of Jurisdiction", *supra*, note 8 at 398. Indeed, Gordon explicitly stated that the "undistributed middle" was a "fallacy". See *infra*, note 19 and accompanying text.

[12]Gordon, "'Administrative' Tribunals and the Courts" (1933) 49 L.Q. Rev. 94, 419 at 100.

[13]Gordon, "The Relation of Facts to Jurisdiction", *supra*, note 2 at 558.

were "unmergeable";[14] "pseudo-conceptions" inevitably merged and collapsed into other concepts, at least when examined through the solvent of Gordon's reason. Qualitative differences within categories were not intellectually powerful or legally relevant; "no difference in degree can be magnified into a distinction in kind."[15] If legal concepts were to be recognized by judges and in turn were to guide them, such concepts had to be channelled into definite categories. A principled claim to relief was a claim of a vested right which existed both before and after the particular claim was decided: "A complaint of injustice or unfairness had always to be brought into some more definite category before a right to relief was established."[16] Categorical reasoning, when used to prune and shape legal concepts, supported an understanding of adjudication as the recognition of pre-existing or vested rights, and supported a professional claim that law was an objective science which defined answers and left no room for choice or judgment.

An important aspect of Gordon's categorical and dichotomous form of reasoning was his belief that false concepts collapsed into each other. For example, review based on errors in determining jurisdictional facts or violations of natural justice was not different in any principled or rational way from the exercise of full appellate review. Similarly, only a "purely arbitrary distinction" existed between review based on a failure to hear and determine by law and review on the basis of any error.[17] Gordon refused to recognize the restrained, result-oriented nature of jurisdictional review because qualitative distinctions were, for him, the product of an inferior, unscientific and unreliable form of reasoning dependent upon the subjective and contingent judgment of the decision-maker. If judges were not guided by clear self-executing principles they could be left only with subjective and arbitrary choices.

In response to judicial "confessions" that the distinctions between jurisdictional and non-jurisdictional facts were often a matter of degree, Gordon bluntly commented: "This is a euphemistic way of saying that the distinctions made are purely arbitrary."[18] Prudential reasoning leading to judicial restraint in the use of jurisdictional fact review was based on "the fallacy of the undistributed middle".[19] The claim that jurisdictional fact review was true law grounded in principle

[14]In another context which reveals his categorical form of reasoning, Gordon wrote of "the oil and water of jurisdiction and procedure". [Gordon, Case Comment on *Ohene Moore* v. *Akesseh Tayee*, *supra*, note 7 at 529.]

[15]Gordon, Case Comment on *McPherson* v. *McPherson* (1936) 14 Can. Bar Rev. 157 at 158.

[16]Gordon, "The Observance of Law as a Condition of Jurisdiction", *supra*, note 11 at 404.

[17]*Ibid.* at 585.

[18]*Ibid.* at 388 n.7.

[19]*Ibid.* at 398.

> had to rest on an intelligible dividing-line between findings or facts distinguished as 'jurisdictional' and others dealt with by the adjudication. No such line has ever been found.[20]

The failure of such a form of review was confirmed by the scholar's inability to induce consistent principles from the cases: "One arbitrary distinction cannot be precedent for another; it is the essence of arbitrariness that it produces no principle."[21] Law for Gordon had the inherent ability to work itself either pure or false; sometimes a little scholarly assistance was needed, but true law could always produce principles which provided consistent and coherent answers.[22]

Gordon favoured the use of the "*reductio ad absurdum*"[23] to test the logic and coherence of concepts. Gordon often drove his doctrinal argument home by stretching what he considered to be weak judicial reasoning to its logical conclusion. The concepts of both jurisdictional facts and natural justice revealed themselves as "pseudo-conceptions" because when pushed to their logical limits they could not produce bright boundaries to define and limit their conceptual scope. No coherent test existed for determining which facts were jurisdictional and which were not, so Gordon concluded that the jurisdictional fact doctrine was really an assertion of full appellate review. The extent of such appellate review was arbitrary because principles did not define the limits of review. Likewise, natural justice revealed no self-executing principles:

> [T]he *reductio ad absurdum* of the 'natural justice' test ... [shows] that once a superintending court accepts the function of redressing injustice that is not 'natural', it cannot logically stop short of exercising appellate jurisdiction whenever any injustice has been suffered.[24]

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[20]Gordon, "Conditional or Contingent Jurisdiction of Tribunals" (1960) 1 U.B.C.L. Rev. 185 at 217. Similarly, writing in 1929, Gordon noted than no principled basis existed or emerged from the cases for defining what errors were reviewable as jurisdictional errors:

> [T]he distinguishing between 'major' and 'minor' constituents of the subject-matter before any tribunal cannot be other than a purely arbitrary process. It cannot be put upon any logical or scientific basis. This is made only too clear by a survey of the actual decisions on what questions are collateral or preliminary, for no intelligible principle can be extracted from them. [Gordon, "The Relation of Facts to Jurisdiction", *supra*, note 2 at 479.]

[21]Gordon, Book Review (1960) 76 L.Q. Rev. 306 at 315. Likewise Gordon questioned: "Must not any system of thought that has neither logic, consistency nor coherence bear within it the seeds of its own dissolution?" [*Ibid.* at 311.]

[22]Dicey shared this faith as he praised the development of Equity into settled rules and even optimistically observed the judicialization of *droit administratif* under the influence of lawyers. [Dicey, "*Droit Administratif* in Modern French Law", *supra*, note 3 at 316-17.] Gordon similarly admired the "legalization" of Equity.

[23]Gordon, "The Observance of Law as a Condition of Jurisdiction", *supra*, note 11 at 402.

[24]*Ibid.*

In the absence of principles to define the exact scope of natural justice, Gordon urged lawyers to accept "[t]he truth ... that no one can define it except by arbitrarily selecting certain injustices, and declaring them infringements."[25] Once scientific lawyers recognized the arbitrariness of the selection process of what was "fundamental", "natural" or "preliminary", they would abandon such *ad hoc* and inconsistent concepts. Principled doctrine emerged as a logical mould which left no room for judicial expansion or contraction for whatever reasons. Law was in its essence self-executing.

Gordon's Hobbesian sense of the egoistic exercise of unbounded will fueled his pessimism about reliance on human judgment. He always assumed that litigants and even judges would push vague and false concepts to the extreme, and that any sort of flexible reasoning left room for abuses. Gordon's assumptions about human nature may have led him to presume that judges would engage in abuses, not in wisdom, restraint or deference, and his epistemological framework led him to favour rights and boundaries over considerations of the good, the prudent and the wise.

Gordon's understanding of jurisdictional review will continue to seem odd and artificial to those accustomed to conceiving of jurisdictional review in functional and qualitative terms. Nevertheless, Gordon's doctrinal arguments can be better grasped in light of his understanding of statutory interpretation and his use of categorical reasoning.

III. The Distinction Between Administrative and Judicial Functions

Gordon ambitiously offered a definition of judicial and administrative functions at a time in the 1930s when increasing caution and scepticism existed about the accuracy and utility of such a conceptual distinction.[26] Gordon's confident and categorical understanding of the distinction between administrative and judicial functions is illustrated by his comments criticizing a case in which *certiorari* was denied to review a decision of the Quebec Workmen's Compensation Commission on the grounds that the

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[25] *Ibid.* at 403.

[26] Even the conservative Donoughmore Committee ventured only a distinction between judicial and quasi-judicial powers and warned "in practical politics an academic attempt to draw the theoretical line may be contrary to common sense." [U.K., Committee on Ministers' Powers, *Report* (London: H.M.S.O., 1932 (reprinted 1956)) at 39 n.129.] Gordon chastised the Committee for drawing back from the needed task of elucidating principles and expounding definitions and promised that "if the true nature of the powers vaguely designated 'administrative' can be identified, the difficulty of distinguishing them will disappear." [Gordon, "'Administrative' Tribunals and the Courts", *supra*, note 12 at 96.] Gordon's categorical form of reasoning also led him to criticize the use of the term "quasi-judicial" in that it suggested that the similarities between judicial and administrative functions were greater than the differences.

Commission exercised administrative functions.[27] Gordon reasoned that most provincial workers' compensation schemes were administrative because:

> The workmen cannot say to the tribunal: You haven't given me what I am entitled to. For the tribunal can answer: You aren't entitled to any particular compensation, only to what we think we can afford to allow you. ... A tribunal that can so answer does not resemble a court of justice; it does not give the workman what he can demand as of right, but only what it considers politic and expedient to give him. ... In the last analysis they have an arbitrary and unfettered discretion, and follow their own will.[28]

In that particular case, however, Gordon concluded that the Quebec Commission, unlike those in other provinces, exercised a judicial function because the legislation prescribed as compensation a fixed proportion of the injured worker's earnings. Gordon believed that such statutory standards gave a worker a right to compensation:

> [T]he whole scheme of compensation leaves nothing to the policy of the Commission. ... The awarding of compensation is purely a matter of ascertaining the facts and making an arithmetical computation. When the computation is wrong, the workman is deprived of what is legally his due.[29]

The analogy between judicial functions and mathematics was not accidental.[30] Law was very much like an arithmetical computation; both proc-

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[27]*A.G. Quebec* v. *Slanec* (1933), 54 C.B.R. 230, [1933] 2 D.L.R. 289 (Que. K.B.) [hereinafter cited to C.B.R.]. The majority of the Court held that non-fault based systems of compensation involved no rights and hence did not involve judicial functions. Dorion J. for example argued at 250:

> Je n'ai pas d'action en dommage si quelqu'un ne m'a pas causé injustement un tort, n'a pas lésé mon droit. ... les tribunaux ne sont pas institués pour créer des droits, ni pour prononcer sur leur existence, à moins que cette existence même soit niée, ou attaquée; et encore faut-il qu'il résulte de cette négation une lésion quelconque.

Gordon, of course, was relying on the D.L.R. translation [at 298]. Walsh J. similarly commented at 256 [D.L.R. at 342.] that: "a legal question has become a social one of insurance"; and at 260-62 [D.L.R. at 346-47.] that it was no longer a question involving abstract rights.

Gordon was cited by Rivard J. in dissent at 269 [D.L.R. at 309.] as providing the basis for such a distinction between judicial and administrative functions. Like Gordon, Rivard J. concluded that the "fonction principale" of the Commission was judicial. In spite of the outcome, all the judges seem to have implicitly accepted to some degree Gordon's distinction between administrative and judicial functions.

[28]Gordon, Case Comment on *A.G. Quebec* v. *Slanec* (1933) 11 Can. Bar Rev. 510 at 511.

[29]*Ibid.* at 511. Similarly, Rivard J., in holding that the Commission exercised a judicial function, quoted Gordon: "When statute provides the standard by which a tribunal is to decide, that tribunal acts judicially."[*Slanec*, *supra*, note 27 at 275 [D.L.R. at 314.], citing Gordon, "'Administrative' Tribunals and the Courts", *supra*, note 12 at 120.]

[30]Rule of Law thought often aspired to the precision of geometric science. See generally M.H. Hoeflich, "Law and Geometry: Legal Science from Leibnez to Langdell" (1985) 30 Am. J. Legal Hist. 95.

esses yielded definite and objectively demonstrable answers on the basis of self-executing principles. The dichotomy between administrative discretion and judicial adjudication, and the bright line boundary between the two methods of decision-making, were central features in Gordon's thought.[31]

As his comments on *Slanec* graphically reveal, Gordon drew a sharp line between judicial and administrative functions which left no room for contextual, functional or institutional considerations. The Quebec Workmen's Compensation Commission was a judicial tribunal solely because it had the "one essential quality" of deciding cases by the application of pre-existing standards.[32] It did not matter that the Commission had "a dozen unessential differences" from a court of law, and that other workers' compensation tribunals, performing the samc functions without a prescribed legislative tariff, were thought by Gordon to exercise administrative functions.[33] Gordon evcn concluded that provincial appointments to the Quebec Commission violated s. 96 of *The Constitution Act, 1867*.[34] Gordon's sense of one essential feature defining the administrative or judicial nature of governmental functions left no room for examining the body in its overall political or institutional context. The manner in which decisions were made was the only consideration which Gordon abstracted out of the mass of political and institutional details.[35] Administrative decisions were the product of arbitrary and subjective choice; judicial decisions were the product of the discovery of objective and pre-existing standards.

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[31]Gordon expressed very similar thoughts in criticizing a case which had held a London County Council licencing resolution to be a judicial order. [Gordon, Case Comment on *R.* v. *London County Council* (1932) 10 Can. Bar Rev. 198.] See *infra*, notes 40-44 and accompanying text.

[32]Gordon, Case Comment on *A.G. Quebec* v. *Slanec, supra*, note 28 at 512.

[33]*Ibid.* Review was excluded by a privative clause, lawyers were not required, the Commission was not bound by *stare decisis*, compensation did not depend on fault and the Commission exercised departmental as well as adjudicative functions.

[34](U.K.), 30 & 31 Vict., c.3 (formerly *British North America Act, 1867*). Once again, Gordon employed all or nothing reasoning that was blind to questions of degree: "Once a partial encroachment on federal powers is countenanced, there is no saying where encroachments will stop, and such legislation as the Quebec *Workmen's Compensation Act* is only an opening wedge." [*Ibid.* at 515.] On the other hand, if Gordon thought a provincial tribunal or board did not adjudicate rights, he saw no section 96 problems, and approved as "outstanding" the decision in *Labour Relations Board (Sask.)* v. *John East Iron Works Ltd*, [1949] A.C. 134, [1948] 2 W.W.R. 1055, [1949] 4 D.L.R. 673 (J.C.P.C.) upholding provincial powers to appoint a labour board. [Gordon, "Administrative Tribunals" (1964) 12 Chitty's L. J. 92.]

[35]Gordon, "'Administrative' Tribunals and the Courts", *supra*, note 12 at 113. An administrative tribunal exercised legislative functions even though it

> may differ from Parliament in nine out of ten characteristics; yet it will still be a legislative body if it possesses the one essential power, the power to make law, that is, to create new legal rights and liabilities by its own acts and according to its own will. [*Ibid.*]

Gordon criticized judicial attempts to control discretion, and he believed that the exercise of discretion could not be restrained on grounds of reasonableness or relevance. Thus an "inquiry into reasonableness must always tend to become merely an inquiry whether the Court agrees with the 'administrative' tribunal's views."[36] As a firm adherent of Parliamentary supremacy, Gordon recognized that statutes could force courts to hear appeals from the discretionary decisions of administrative bodies, but he was remarkably frank in admitting that an appellate court could "only apply in turn its own ideas of policy and expediency ... [and substitute] its own legislation for the legislation below that displeases it."[37] No standards or lines defined what was reasonable or what considerations were relevant, and in the absence of such self-defining guides, a reviewing court was free to assert its own opinion and will. Gordon refused to recognize the qualitative notion of a limited and deferential form of review that was not simply the measure of the courts' different opinions as to what was politic and expedient. Partly because Gordon expected so much from law in its pure form, he appeared willing to tolerate anything in the exercise of discretion.

Gordon defined judicial functions narrowly, largely because he refused to recognize creative law-making as part of adjudication, and he refused to inflate interests into rights. Judicial functions were only concerned with the recognition of pre-existing rights and Gordon refused to label regulatory activities judicial. Thus, they would not be subjected to a wider form of review unless the person affected by the regulation could *ex ante* claim a legal right in the result. Judicial bodies were limited to the recognition of rights that already existed in standards and "[i]f a court were asked to take away a legal right or impose a liability, it would be bound to disclaim possession of the necessary power."[38] In contrast, administrative bodies, like Parliament, enjoyed the freedom of creating legal rights and never being wrong.[39]

Gordon's comments on licencing provide an application of his understanding of the difference between judicial and administrative functions. Licencing was an administrative function because:

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[36]*Ibid.* at 423. Likewise, in the absence of ascertainable legal standards, the question of the relevancy of considerations was incoherent because:"'Extraneous' considerations can only mean considerations falling outside boundaries that are fixed and ascertainable; and policy and expediency have no such boundaries." [*Ibid.* at 424.]

[37]*Ibid.* at 115-16. Parliament could always give courts the difficult task of reviewing discretion, but he warned: "No Court of law can depart from objective standards, in examining the proceedings of inferior tribunals, without being led into a quagmire." [*Ibid.* at 427.]

[38]*Ibid.* at 103. See also *infra*, note 40 and quotation in accompanying text.

[39]Gordon, "'Administrative' Tribunals and the Courts", *supra*, note 12 at 117.

> no one can argue that the applicant for a licence has any right to it, he is applying for a privilege. ... [A] judicial tribunal does not create legal rights ... . It confers nothing, it merely gives effect to the pre-existing rights of the parties. ... Creation is not a judicial function.[40]

Gordon was a strict positivist in the sense that, in order to discover if vested rights were involved in regulatory activities, he would look to the words of the statute and not to his own understanding of what interests were valuable and important. For example, he disagreed strongly with the reasoning in a case in which a decision of the London County Council was reviewed by means of *certiorari* on the grounds that the licencing of cinemas "affected rights" by conferring a monopoly and thereby restricting the "rights" of others to earn a livelihood.[41] Gordon objected to stretching the definition of rights and judicial functions in order to provide a remedy by way of *certiorari*:

> When the phrase 'affects rights' is used in a larger sense, as including the conferring or creation of rights, it is no longer applicable to judicial orders. In truth, an order that affects rights in the sense of conferring or creating them has much more in common with legislative than with judicial functions. Such orders are those commonly termed 'administrative'.[42]

Applicants for a licence could claim no right to a licence, they could only hope to persuade the Council that it was "politic and expedient" to grant them a licence. Gordon would not let concerns for property interests or administrative injustice blur the conceptual clarity of the distinction between law and discretion. As in the case of his assessment of workers' compensation schemes, Gordon seemed indifferent as to whether the legislature simply granted discretion to those who administered legislation or chose to vest rights for the benefit of those subject to the legislation.

The individuals affected by the exercise of administrative discretion were analogized to those groups who lobby Parliament, not litigants who claimed legal rights in a court of law.[43] Gordon was willing to pursue the analogy of administrative functions to legislative functions even to the ex-

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[40]Gordon expressed this thought even more tersely: "There is no question of legal right; an applicant for a new licence has no rights." [Gordon, Case Comment on *R.* v. *London County Council*, *supra*, note 31 at 201.]

[41]*R.* v. *London County Council, Exparte Entertainment Protection Association Ltd*, [1931] 2 K.B. 215 at 233-34 *per* Scrutton L.J.; and at 243-44 *per* Slesser L.J.

[42]Gordon, Case Comment on *R.* v. *London County Council*, *supra*, note 31 at 206.

[43]*Ibid.* at 204. Moreover, Gordon went on to oppose the false imposition of an adversarial private law model on the public and legislative nature of administration:

> The tribunal is not really interested in the respective claims of the individuals, but in the result to the public of granting what is asked. If a contest between the applicant for, and opponent of, a theatre license were a *lis inter partes*, then equally the contest between the applicant for and opponent of a private Act would be a *lis inter partes*. [*Ibid.*]

tent of recognizing and tolerating an inevitable form of bias in administrative tribunals:

> [S]uch tribunals are never strictly disinterested; they are always deciding between A and the public, yet themselves represent the public.[44]

Gordon was not imperialistic in imposing legal standards on administrative tribunals, and it would have been difficult for him to squeeze the public interest considerations he recognized in the exercise of administrative discretion into his Rule of Law vision of adjudication as the recognition of pre-existing rights. In turn, Gordon did not speculate on what was required by the public interest. Such speculations would necessarily be subjective and arbitrary because no rights were at stake. As such, they did not lie in the purview of the scientific lawyer.

Many of Gordon's doctrinal arguments were based on a faith that courts could adjudicate questions of law in a definite and objective manner. Adjudication could be frustrated by a "vague and unscientific" use of language,[45] but that did not mean that language properly used could not define rights clearly and uncontroversially. In manipulating the pre-existing and ascertainable standards of law to achieve just results in hard cases, a "sympathetic" judge would in

> helping one individual ... [injure] a thousand by making the law uncertain. ... [Such] arbitrary decisions have *destroyed* legal right and liability *ad hoc*; what a would-be suitor is left is a gambler's chance.[46]

Inherent in this critique was an understanding that law gave people vested rights which could be claimed and recognized in court. Judicial recognition of these legal rights was not a creative or subjective process. Gordon was extremely hostile to result-oriented judicial review because it threatened the stability and objectivity of his view of adjudication.

Not all decisions made by courts were the results of an objective form of adjudication. Unless a set standard was established by law, judicial review of discretionary decisions would only provide the reviewing court with the "power to substitute its own arbitrary views for the inferior Court's arbitrary views."[47] Gordon readily admitted that judges exercised an "arbitrary" discretion in determining the exact length of criminal sentences or the quantum of damage awards. Given the categorical nature of his reasoning and his

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[44]Gordon, "'Administrative' Tribunals and the Courts", *supra*, note 12 at 434.

[45]*Ibid.* at 100.

[46]Gordon, Book Review, *supra*, note 21 at 314.

[47]Gordon, "Excess of Jurisdiction in Sentencing or Awarding Relief" (1939) 55 L.Q. Rev. 521 at 523-4.

rigorous standards for adjudication, it is not surprising that Gordon resisted any attempt to impose standards on the exercise of discretion.

Gordon drew a sharp distinction between the objective and the subjective. If no standards existed, a decision-maker could "only apply a subjective standard, his own arbitrary opinion, his own policies and ideas of expediency."[48] In assessing the exercise of discretion, appeal to overriding values was not a particularly honest or helpful manner of expressing disagreement:

> The complaint of unreasonableness can only be a complaint that the decision has been given one way when it ought to have been given the other way.[49]

Complaints of unreasonableness were not powerful because in the absence of standards, complainants had no rights to a certain result, and not even rights not to have outrageously unreasonable results. An unresolvable difference of opinion existed and the subjective opinion of the administrative body prevailed because the state had given it jurisdiction to determine the particular question. Gordon's idealistic vision of self-executing law was mirrored by his pessimistic vision of arbitrary discretion.

In conclusion, Gordon's arguments about judicial review seem less anomalous when examined in the context of his own understanding of law. Gordon's ideal understanding of adjudication as the recognition of pre-existing rights and his penchant for categorical reasoning underlie his major contributions to the doctrinal debate. Jurisdiction was a categorical and bounded concept; courts had no tools to go inside jurisdiction to police the reasonableness or merits of decisions. Likewise, courts could not intervene in administrative determinations of the public interest in a principled fashion because they could only recognize, not create, rights and liabilities. The prospects for Gordon's analogy between administrative and legislative functions will be examined in the last part of this paper. First Gordon's thought can be better understood by comparing it to that of his contemporaries over fifty years.

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[48]Gordon, "'Administrative' Tribunals and the Courts", *supra*, note 12 at 117. Subjective power was in the last analysis unfettered discretion or following one's own will. [*Ibid.* at 109-10.] Once the boundary between the subjective and the objective was crossed, there was no room for qualitative control of subjective discretion.

[49]*Ibid.* at 420 n.5. Similarly, Gordon wrote:

> To say that a decision is unfair or arbitrary is simply to say that it is unjust; but if this means merely that it is unethical, no Court of law can interfere. Courts of law are not Courts of conscience. It is only if a decision is unjust in the sense of being a denial of justice, i.e. a denial of legal rights, that a Court of law can even weigh its deficiencies. [*Ibid.* at 441.]

IV. Gordon and His Contemporaries

Writing in the 1930s, Gordon played the role of an expounder of the law. As a result, his writings demonstrated no concern for historical context or for the positions taken by other commentators. Principles, logic and reason were timeless and required no debate with others once they were revealed. Unlike Dicey, who wrote *An Introduction to the Study of the Law of the Constitution* in 1885, Gordon felt no need to claim his territory for lawyers, and to refute the claims of historians and philosophers. He shared with Dicey the quest for scientific understanding and he envisioned his task as the dispelling of superstition, but it was a testament to the success of Rule of Law thought that he believed he need only address the last few superstitions of lawyers. The legal focus of his work did not, however, stop Gordon from borrowing many of the rhetorical techniques Dicey used in his battle with the philosophers and historians. Both Dicey and Gordon painted their opponents as sentimentalists who responded out of subjective motives and did not push their thoughts into the objective realm of true understanding and logic. Both thinkers also appealed to the concept of inevitable progress in the development and refinement of legal doctrine.[50]

Gordon's critical attitudes toward precedents may surprise those who associate the Rule of Law's "formalism" with a blind faith in *stare decisis.* Such an equation ignores the radical reforming edge of the Rule of Law vision created by Dicey and the other text-book writers who tried to justify their academic enterprise to a sceptical profession. They believed they could bring out the principles that lay beneath the decisions, but were often obscure to the untrained eye. The clarification of the underlying principles would make law more orderly and scientific.[51] In order to justify their role, Rule of Law scholars had to bring a semblance of scientific order to the cases and this often entailed rejection of the decisions which did not fit with the

[50]Gordon, for example, prefaced one of his major articles declaring: "The law, like other sciences, has had its superstitions which, after flourishing openly for generations, or more discreetly for centuries, have at last been seen for what they are and been utterly discredited." [Gordon, "The Observance of Law as a Condition of Jurisdiction," *supra,* note 11 at 387.]

[51]A good example of a tactful Gordon trying to persuade the profession that his theories were supported by at least the bulk of authority is found in one of his earlier articles, on error of fact. Gordon argued:

> [E]rror in fact has always been perceived, though through a glass, darkly. To recognize it officially now is not to change the law, but to restore and rationalize it. If a correct and logical explanation of a settled practice is available, it is unthinkable that the Courts must continue to account for it by theories obviously false and illogical. [Gordon, "Certiorari and the Revival of Error in Fact" (1926) 42 L.Q. Rev. 521 at 526.]

Gordon, like other Rule of Law scholars, could present his reforming enterprise through the rhetoric of both science and conservatism.

over-arching principles.[52] This radical reforming edge was tempered by the need to respect the profession and the courts. Gordon, writing in the 1930s and later, could afford to venture more overtly critical assessments of judicial decisions and to speculate more openly about judicial motiviations than many of the earlier Rule of Law scholars. Writing at the dawn of the realist movement, Gordon could even, at times, resemble a "trasher". In his first major article on jurisdiction Gordon bluntly noted that "there is virtually no proposition so preposterous that some show of authority to support it cannot be found,"[53] and he did not hesitate to catalogue inconsistent rulings for pages on end. Gordon's biting criticisms were, however, always directed to the goal of improving and rationalizing legal doctrine by making it internally consistent, and he did not believe that law must direct itself outward to society in order to be reformed.

Law and politics were sharply distinguished in Gordon's mind and he believed that political considerations could not be regulated or bounded by law. Likewise Dicey, writing in 1915, seemed worn down enough to give much ground to the administrative state by simply labelling it "politics" and "business".[54] For both thinkers, once the line of law was passed, nothing remained but will and power. Just as ordinary law in ordinary courts was the same for public and private actors, unrestrained power and will was the same whether exercised by the state or by private actors.

Gordon's work demonstrated none of the self-conscious understanding of historical development that was the foundation of Dicey's understanding of the rise of collectivism or the development of *droit administratif*.[55] Gordon's understanding of judicial attitudes was fundamentally ahistorical and

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[52]See generally Sugarman, "Legal Theory, The Common Law Mind and the Making of the Textbook Tradition" in W. Twining, ed., *supra*, note 1.

[53]Gordon, "The Relation of Facts to Jurisdiction", *supra*, note 2 at 459.

[54]Dicey mourned the demise of the Rule of Law and suggested it may be beyond redemption:

> [W]e must remember that when the State undertakes the management of business properly so called, and business which hitherto has been carried on by *each individual citizen* simply with a view *to his own interest*, the Government ... will be found to need that freedom of action necessarily possessed by every private person in the management of his own personal concerns. ... The management of business, in short, is not the same thing as the conduct of a trial. The two things must in many respects be governed by totally different rules. [Dicey, "The Development of Administrative Law in England" (1915) 31 L.Q. Rev. 148 at 150 (emphasis added).]

[55]See generally Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, *supra*, note 5; and *An Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan, 1965) Chapter 12.

apolitical.[56] Legal doctrine, even with its errors and fallacies, was an autonomous discourse which was determined by and judged on the sole ground of its internal logic. Gordon did not recognize boards or tribunals as a functional category; such bodies were more often than not lumped into the juristic category of inferior bodies with summary conviction courts, justices of the peace and ecclesiastical courts. Later in his career Gordon allowed his politics to show on the edges and, interestingly, they were as individualistic and opposed to collectivism as those of Dicey.[57] Nevertheless, these

[56]Gordon's criticisms of intervention on the basis of error in the determination of jurisdictional facts were profoundly ahistorical. In one article he cited three cases as examples of abuse of that doctrine. The cases were decided in 1853, 1926 and 1686. [Gordon, "Jurisdictional Fact: An Answer" (1966) 82 L.Q. Rev. 515 at 518.] Gordon seemed more concerned with the hostility the courts had once displayed towards ecclesiastical courts than with any hostility towards administrative bodies. [Gordon, "The Observance of Law as a Condition of Jurisdiction", *supra*, note 11 at 393; "Certiorari to an Ecclesiastical Court" (1947) 63 L.Q. Rev. 208.]

[57]In 1951, he criticized a judicial refusal to review a decision to withdraw a cab-driver's licence by arguing:

> Even if being subject to review could be looked on as some slight hardship on a Commissioner, how could this be compared to what cab-drivers might suffer if the Divisional Court was right — if the regulations let drivers have their livelihood taken from them by *ex parte* decisions, decisions even based on hearsay? [Gordon, "The Cab-Driver's Licence Case" (1951) 70 L.Q. Rev. 203 at 213.]

Earlier in his career he had resisted arguing that judicial evidentiary standards should be imposed on regulators making discretionary decisions. [Gordon, "'Administrative' Tribunals and the Courts", *supra*, note 12 at 430.]

Gordon even departed from his beloved notion of absolute jurisdiction to provide some support for the Supreme Court's controversial *Globe* union membership card decision by contemplating the loss of jurisdiction after a tribunal had begun to address the question entrusted to it. [*Toronto Newspaper Guild* v. *Globe Printing Co.*, [1953] 2 S.C.R. 18.] Even in justifying the court's interference with the Labour Board's determination of membership, Gordon concerned himself with finding "an intelligible dividing line" and a "line of distinction" between mere error and refusal of jurisdiction. [Gordon, Case Comment on *Toronto Newspaper Guild* v. *Globe Printing Co.*, *supra*, note 8 at 1162.] He stated:

> [N]o past discussions on the dividing line have been very illuminating. Yet it does not seem an impossible task to find a way of parting the sheep from the goats, even if practical application of the best test that can be evolved must always present some difficulty. [*Ibid.*]

In 1965, Gordon resembled Dicey as he opposed the House of Lords expansion of liability in *Hedley Byrne* v. *Heller*, [1964] A.C. 465, [1963] 3 W.L.R. 101, [1963] 2 All E.R. 575 on the grounds that it represented a "welfare state mentality". He insisted that consideration and privity of contract were "most in harmony with the individualistic spirit of the common law before the day of the welfare state." [Gordon, "*Hedley Byrne* v. *Heller* in the House of Lords" (1965) 2 U.B.C.L. Rev. 113 at 155-6.] Even in the midst of this political fancy, Gordon still expressed his faith in the divide between law and politics by quoting with favour Lord Jowitt, L.C. at 157: "I do most humbly suggest ... that the problem is not to consider what social and political conditions of today require; that is to confuse the task of the lawyer with the task of the legislator." Similarly, in 1961, Gordon characterized the primary intent of the *Canadian Bill of Rights* to be the prevention of "the possibility of a communist (or even a socialist)

comments are indiscreet anomalies in Gordon's writing, and the bulk of his contribution remained apolitically conceptual in both intent and execution.

Jurisdiction was a crucial tenet in Dicey's conception of the Rule of Law because it provided the means for the ordinary courts to determine as a matter of regular law whether officials had exceeded the extent of their legal authority.[58] Gordon assumed courts could enforce objective limits of power, but he concerned himself with the methods by which the ordinary courts determined these limits. Law as objective limits was taken to its logical extension, turned in on itself, and applied to the method by which the courts decided to intervene. Gordon stressed the more formal concern with the rigour of the methods used by courts to discover and locate the exact position of the limits of power and not Dicey's libertarian celebration of the very existence of a judicial process to limit state power.[59] For example, Gordon, unlike Dicey, did not take comfort in predictions that

> it is probable that in *some form or other* the English courts will always find the means for correcting the injustice, if demonstrated, of any exercise by a Government department of judicial or quasi-judicial authority.[60]

Gordon took form even more seriously than Dicey did, and he could not sanction haphazard intervention to relieve injustice based on only what Dicey believed were the praiseworthy "feelings of magistrates".[61] Gordon really tried to be a scientific lawyer, not a partisan of the High Court.[62]

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government's coming into power." [Gordon, "The Canadian Bill of Rights" (1961) 4 Can. Bar J. 431.] Despite his revival of red scare rhetoric, Gordon was most concerned that the "vague", "abstract" and "unworkable" concepts of a bill of rights would disrupt orderly evolution of law into a science explained by a few principles. Likewise, Gordon was uncomfortable with the conceptual justification for the Supreme Court's civil libertarian intervention in the administrative process in *Smith and Rhuland Ltd* v. *R.*, [1953] 2 S.C.R. 95. [Gordon, Case Comment (1954) Can. Bar Rev. 85.]

[58]Dicey, *An Introduction to the Study of the Law of the Constitution*, *supra*, note 55 at 389; "*Droit Administratif* in Modern French Law", *supra*, note 3 at 305; "The Development of Administrative Law in England", *supra*, note 54 at 151.

[59]Dicey wrote:

> Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, *what is more*, by the interpretation put upon the statute *by the judges*. [Dicey, *An Introduction to the Study of the Law of the Constitution*, *supra*, note 55 at 413 (emphasis added).]

[60]Dicey, "The Development of Administrative Law in England", *supra*, note 54 at 151 (emphasis added).

[61]Dicey, *An Introduction to the Study of the Law of the Constitution*, *supra*, note 55 at 413.

[62]On this aspect of Dicey's thought, see generally, H. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1 at 6ff.

The ideological link between Dicey and J.C. McRuer has been recognized.[63] Thus, it is not surprising that many of the differences between McRuer and Gordon track the differences between Dicey and Gordon. McRuer, writing his *Inquiry into Civil Rights* in the late 1960s championed jurisdictional review of preliminary and collateral facts, not only on the basis of precedent, but also as "desirable safeguards against the arbitrary exercise of the powers" of administrative bodies.[64] Functionalist defences of a more restrained form of review were dismissed with the anti-statist rhetoric associated with Dicey.[65] McRuer recognized the imprecise nature of jurisdictional fact review, but was willing to tolerate doctrinal ambiguity for the sake of asserting the power of ordinary courts. Unlike Gordon, who was willing to admit that a court's opinion as to the existence of a preliminary or collateral fact was not inherently better than the opinion of an inferior body and that the legislature had preferred the opinion of the inferior body through the grant of jurisdiction, McRuer simply argued that the ordinary court could "objectively" determine preliminary or collateral facts.[66] Gordon's sense of the subjective nature of fact determination,[67] as well as his refusal to paper over what he saw as logical inconsistencies in jurisdictional fact review and to rely on misplaced rhetoric about the need for ordinary courts to supervise administrative bodies, helps to explain his parting of doctrinal ways with McRuer. Nevertheless, it should not be assumed that Gordon's subjectivism about fact determination eroded his faith in the objective nature of law, properly conceived and executed. In Gordon's Rule of Law vision, facts could be subjective while law was objective. Moreover, while McRuer could only postulate a theoretical and ideal dichotomy between adjudicative recognition of pre-existing rights and legislative policy-making, Gordon actually believed this was the way legal systems should and could operate. In short, McRuer and Dicey shared a faith in the ordinary courts, but Gordon's faith in the ordinary courts truly depended on the possibility of an objective science of law.

[63]See Arthurs, *ibid.*; and J. Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18 U.T.L.J. 351.

[64]J.C. McRuer, Ontario, *Royal Commission Inquiry into Civil Rights* (Toronto: Queen's Printer, 1968) Report 1, vol. 1 at 76.

[65]McRuer, for example, denied that findings of preliminary or collateral matters required expertise, but argued that even if they did, then "independence of judgment divorced from departmental atmosphere is of much greater importance as a safeguard of rights than any benefits that might be derived from expertise." [*Ibid.* at 306.]

[66]*Ibid.* at 252.

[67]The distinction between the objectivity of law and the subjectivity of facts was a crucial element of the Rule of Law vision. Gordon, for example, noted: "a judicial tribunal does not have contact with facts, but only with allegations." [Gordon, "Conditional or Contingent Jurisdiction of Tribunals", *supra*, note 20 at 207.]

Dicey and McRuer differed from Gordon primarily in their championing of judicial review, even at the cost of conceptual clarity, but other of Gordon's contemporaries more deeply challenged his very understanding of law. Gordon believed that all the components of a sound jurisprudence were within the semantic and logical puzzle that was the case and statute law, whereas the realists believed a correct reading of the social record and the adoption of new functional approaches to law were required.[68] Gordon believed that correct answers to questions of statutory interpretation could be produced by a more exact use of language. For example, jurisdiction had a "strict, technical meaning" which would yield definitive interpretations if judges would only desist from "abuse of language" by using the word in its "loose popular sense".[69] Logical fallacies in conceptual thinking would be exposed if it were not for the use of vague language.[70] Gordon promised that the careful use of words and the logical understanding of principles could provide "reasonably certain answers ... for most of the problems that have been perplexing the Courts."[71] Despite his sometimes vituperative criticisms of inconsistencies and fallacies in judicial reasoning, Gordon believed that even the recalcitrant law of judicial review could be perfected by proper attention to language and principles.

As Gordon wrote in the 1930s, his attitudes about language and adjudication and its autonomy and objective nature were rejected by academics influenced by the sociological jurisprudence and realist movements. The sociological jurisprudence movement first attacked the Rule of Law vision for its "slot machine" jurisprudence which ignored context and conse-

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[68]Gordon maintained that "all necessary materials for a sane, coherent and self-consistent theory of jurisdiction already exist; they only need piecing together." [Gordon, "The Relation of Facts to Jurisdiction", *supra*, note 2 at 460.]

[69]Gordon, Case Comment on *Ohene Moore* v. *Akesseh Tayee*, *supra*, note 7 at 523. Gordon criticized Parliament for its loose use of language as did the great Rule of Law scholar Sir Frederick Pollock. [Pollock, Editorial Comment (1915) 31 L.Q. Rev. 153.]

[70]Gordon, "The Observance of Law as a Condition of Jurisdiction", *supra*, note 11 at 386. Gordon observed "equivocal or elliptical language in statutes can leave uncertainty whether powers are judicial or 'administrative'. However good a test is available, this cannot overcome uncertainty as to what Parliament means." [Gordon, "'Administrative' Tribunals and the Courts", *supra*, note 12 at 116-17.] Likewise, in the crucial area of jurisdiction Gordon criticized

> the casual and unscientific wording of legislation that creates a new jurisdiction. Instead of first creating an area of judicial power and then prescribing how it shall be exercised, the Legislature often devotes its whole attention to the manner, leaving the power itself a mere matter of inference. [Gordon,"The Observance of Law as a Condition of Jurisdiction", *supra*, note 11 at 569.]

Inherent in this criticism was a faith that the Legislature could use language to define the nature of the power exercised and to prescribe the scope of authority in a definite and self-evident manner. Thus major inroads into the two main problems of administrative law that captured Gordon's concern could, in large part, be achieved through a better use of language.

[71]Gordon, "'Administrative' Tribunals and the Courts," *supra*, note 12 at 419.

quences. Writing in the late 1920s, Harvard professor John Dickinson tried to deal with many of the problems Gordon battled with, but after studying with Pound and Frankfurter,[72] he did not have the same faith in the objective nature of adjudication as Gordon did. Dickinson, felt compelled to take a "more realistic view of the nature of legal concepts":

> They are not spatial entities having the independent and inexorable existence of physical objects and excluding each in all dimensions. Properly regarded, they are seen to be capable of overlapping and intersecting and interpenetrating. ... The variety of possible classifications is as infinite as the infinite numbers of purpose for which classifications can be made.[73]

Gordon, in contrast, saw the concept of jurisdiction as a vacuum-sealed boundary that left no room for qualitative judgments or for tailoring to social purposes. Merits and purposes did not matter as long as the conclusion announced by the tribunal interlocked with the scope of authority objectively defined in the enabling statute. Dickinson noted that the jurisdictional fact doctrine was not applied logically and left an inconsistent trail of cases, but unlike Gordon recognized that this quality could serve useful purposes in preventing occasional administrative injustices.[74] Gordon's criticisms of the inconsistencies in the doctrine were not compelling because for Dickinson law was "something other than a logical game where counters are manipulated to achieve formal symmetry... ."[75] Law was not "a closed mathematical system of rigid concepts but a developing organic system of

[72]Dickinson dedicated his major work, *Administrative Justice and the Supremacy of Law in the United States*, *infra*, note 74, to Pound and Frankfurter, his mentors at Harvard.

[73]J. Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge, Mass.: Harvard University Press, 1927) at 134-36. The writings of Dickinson made it clear that it would be a mistake to believe the Realists offered the first real challenge to the Rule of Law vision. A Canadian commentator, Nigel Tenant, writing in 1928, challenged the Rule of Law vision with sociological and functional theories of administrative law. Influenced by American scholars, Tenant, saw the importance of expertise and questioned the airtight and self-defining nature of legal categories such as the distinction between law and fact. [N. Tenant, "Administrative Finality" (1928) 6 Can. Bar Rev. 497 at 509.]

[74]Dickinson, *ibid.* at 309ff. Dickinson argued that jurisdictional fact review was only "nominally ... [the] result of construing the statute but ultimately, of course as a result of applying [the court's] view of sound public policy." With a realistic flourish, he later argued that the decision to hold facts jurisdictional was result-oriented and depended on the court's "sympathy with the administrative method of regulating the subject matter dealt with." [Dickinson, "*Crowell v. Benson*: Judicial Review of Administrative Determinations of Questions of 'Constitutional Fact'" (1932) 80 U. Penn. L. Rev. 1055 at 1064.]

[75]Dickinson, *Administrative Justice and the Supremacy of Law in the United States*, *supra*, note 74 at 336.

concepts, more or less elastic."[76] Dickinson at once expected less from law in terms of internal logic, but more from it in terms of social purpose.

The rhetorical success Gordon achieved by maintaining the imprimatur of objectivity and logic is well illustrated by a disagreement that he had with Caesar Wright in the 1936 issue of the Canadian Bar Review. Gordon wrote a case comment suggesting that a tribunal could not lose jurisdiction "however erroneous, irregular or censurable its procedure may have been."[77] In a style characteristic of Dicey, Gordon revelled in the fact that he was expounding "a fairly obvious conclusion, procedure and jurisdiction are two quite separate things."[78] He confidently argued that from the standpoint of logic, there was nothing to be said on the other side. Wright, in a reply, felt compelled to defend an Ontario case[79] in which the limited view of jurisdictional error enunciated by the Privy Council in *Nat Bell*[80] and espoused by Gordon was distinguished, in order to hold that a police magistrate had lost jurisdiction by convicting an unrepresented accused of a liquor offence under *The Indian Act* without hearing any evidence. Wright admitted that he saw much in the logic of Gordon's reasoning that jurisdiction was definitely assumed at the start of the hearing because the tribunal had undisputed power to decide guilt or innocence with regard to this offence. Likewise, Wright was concerned that the distinction that the judge had used to review the unfair decision in *Re Nelson*[81] was not a bright line and the phrases used might even be "futile as guides for future decisions".[82] Despite these concessions to Gordon's argument, Wright defended the court's intervention in the case while apologetically admitting that he

[76]*Ibid.* at 121. Pound, likewise, spoke disparagingly of "[a] tendency to logical analytical precision and classification and to rigid definition" in the nineteenth century. [R. Pound, *Administrative Law, Its Growth, Procedure, and Significance* (Pittsburgh: University of Pittsburgh Press, 1942) at 96.]

[77]Gordon, Case Comment on *McPherson* v. *McPherson, supra,* note 15 at 157.

[78]*Ibid.*

[79]*Re Nelson,* [1936] O.R. 31. McTague J. had appealed at 32-33 to factors that Gordon would have dismissed as imprecise, unscientific and sentimental: "To hold that in such circumstances the Magistrate had jurisdiction would offend all the principles of natural justice." Gordon later wrote that McTague's decision was "altogether wrong and illogical . . . clearly untenable and against authority." [Gordon, Case Comment on *Re Nelson* (1936) 14 Can. Bar Rev. 262.]

[80]*R.* v. *Nat Bell Liquors Ltd,* [1922] 2 A.C. 128, 65 D.L.R. 1, [1922] 2 W.W.R. 30, 37 C.C.C. 129 (J.C.P.C.).

[81]Interestingly, counsel for the police magistrate, then J.C. McRuer K.C., made an argument very similar to the one Gordon articulated. Later in his career McRuer would defend a more expansive understanding of jurisdictional error, but as an advocate he embraced the logic of Gordon's arguments.

[82]C. Wright, Editorial Comment (1936) 14 Can. Bar Rev. at 159.

> must confess to a feeling that the conclusion reached in *Re Nelson* is a highly desirable one, although he is willing to admit that this may be due more to an inarticulate sympathy than to any logically satisfactory proposition.[83]

Wright still had a professional respect for both the conceptual and practical elements of Gordon's argument in favour of definite, objective and self-executing concepts.[84] It was a testament to the continued intellectual hold of Rule of Law thought that Wright felt compelled to make a "confession" about "feelings", "an inarticulate sympathy" and the lack of "any logically satisfactory proposition" to refute Gordon's argument. It was also an indication that many influenced by sociological and realist scholarship expected more from law than its internal qualities. Wright's apologetic and hesitant approach, however, suggests that many lawyers were not comfortable in expressing the extra demands placed on law in language that went beyond appeals to enlightened and interstitially exercised discretion.

Although Wright departed from the logical and conceptual reasoning embraced by Gordon only apologetically and with some reluctance, other Canadian scholars offered a more direct and powerful critique of Gordon's approach. John Willis disparaged theoretical categories and conceptual reasoning; he argued that courts should concern themselves with questions of degree on the basis of particular circumstances.[85] Willis, like Frank Scott, believed conceptual reasoning obscured the importance of the attitudes and policy orientations which influenced the inevitable choice of which concepts to embrace in hard cases.[86]

Jacob Finkelman, like Willis, directly challenged the internal logic of Gordon's thought by arguing that "the strong demands of social functionings

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[83] *Ibid.*

[84] On Wright, see generally R.C.B. Risk, "Volume I of the Journal: A Tribute and a Belated Review" (1987) 37 U.T.L.J. 193 at 196-8; and C.I. Kyer & J.E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923-1957* (Toronto: Osgoode Society, 1987).

[85] J. Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 U.T.L.J. 53.

[86] Scott and Gordon disagreed about the role of judges in adjudication. In 1947, Gordon criticized the Privy Council's decision on the abolition of Canadian appeals to it on the ground that the Lordships had been forced to take "positions that are logically untenable and to assign meaning to language that it cannot bear." [Gordon, Part I, "Abolition of Appeals to the Privy Council: A Symposium" (1947) 25 Can. Bar Rev. 557 at 558. In reply, Scott argued in the same symposium that a

> judge-interpreter cannot escape the role of statesman, however much he may try to cling to the letter of the law. There are few cases in courts of appeal so clear that an alternative decision is not possible, and where there is a choice of constitutional alternatives there is necessary a choice also of political ends. [F.R. Scott, Part III, *ibid.* at 566.]

bite into the over-simple or over-rigid concepts however hallowed."[87] "Logic delights in categories and differentiations; experience is a guide which is unconscious of them and provides life with working principles."[88] Finkelman recognized that Gordon's reasoning made the work of a judge less problematic and value-ladened, but warned that "logic must be robbed of its symmetrical beauty and childlike simplicity"[89] if law was to be a socially responsive force. Finkelman thus disparaged the qualities of reasoning that Gordon identified as the essence of law.

Finkelman was less radical than Willis in that he was more willing to envisage a greater role for *ad hoc* judicial intervention. Finkelman argued:

> It is better for law, in serving the ends of society, to allow as much freedom as possible to the judiciary in controlling 'administrative' action, to take the risk of confused judgments, of 'distinguishings', of 'distinctions', rather than to cabin and confine the discretion of the judges.[90]

Both Willis and Gordon would have been somewhat uneasy, but for very different reasons, with Finkelman's advocacy of a loose *ad hoc* form of judicial review. Gordon, of course, viewed such uncategorized forms of review as the antithesis of law and a betrayal of its promise of scientific objectivity. Willis, on the other hand, viewed the policy dispositions and "ideal constitutions" of judges with enough suspicion to have his doubts about sanctioning even selective review. Finkelman wanted to keep review fluid and he may have hoped, like Wright, that courts would continue to vindicate his "inarticulate sympathies". In turn, Gordon did not want sympathy of any kind while Willis feared sympathies of the wrong kind.

Despite their very different approaches to the law, John Willis could not have criticized Gordon for adopting an overt prejudice against administrative activity associated with Lord Hewart and other conservative law-

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[87] J. Finkelman, "Separation of Powers: A Study in Administrative Law" (1930) 1 U.T.L.J. 313 at 321.

[88] *Ibid.* at 313.

[89] *Ibid.*

[90] *Ibid.* at 342. Finkelman's approach was similar to that of the American scholar John Landis. Landis was concerned that the policy and efficiency of administrative agencies would be threatened by jurisdictional review which constituted trial *de novo* on technical and complex questions. Furthermore, he feared delay would be created and courts would decide crucial questions without the expertise of the agencies. [J.M. Landis, *The Administrative Process* (New Haven: Yale University Press, 1938) at 142.] Landis was content with a functionalist, contextual *ad hoc* approach to review which "affords no definite answers". [*Ibid.* at 153.] Gordon, in contrast, always promised definite answers because his Rule of Law reasoning was aimed at determining sharp conceptual boundaries and not at evaluating policies, institutional competence or preventing administrative injustices.

yers;[91] he even willingly made use of Gordon's argument that procedural errors could not deprive a tribunal of jurisdiction.[92] Although Willis saw administrative law in a social and political context which Gordon ignored, it is significant that when he was most pessimistic about the prospects for the reform of legal reasoning, he adopted an external perspective to judicial review which limited judicial intervention in a manner fairly similar to that of Gordon.

Gordon and Willis were unlikely allies in their opposition to the fairly formalized and structured form of review proposed by the influential Committee on Ministers' Powers. Reporting in 1932, the Committee on Ministers' Powers had lost faith in ever returning review by way of the prerogative writs to their proper principles. Instead, the Committee proposed allowing appeals from quasi-judicial decisions which were either unfair or embraced extraneous considerations.[93] Gordon opposed such review of administrative decisions by reference to his ideal vision of courts recognizing pre-existing rights and his reluctance at having the High Court assume the "alien" and "arbitrary" function of second guessing the legislative opinions of administrative tribunals.[94] Willis also agreed that the courts were not competent to entertain such questions. Willis' concerns about judicial competence were based, however, on the inability of courts to advance social policies with the same skill as the experts in the bureaucracy, and not on the abstract ideal of adjudication embraced by Gordon.[95] Motivated by these very different concerns both Willis and Gordon recognized that even formalized appeals from administrative decisions would force the courts to deal with matters of policy for which they were ill-suited.[96] Those passion-

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[91]As such, Gordon does not fit into the pattern observed by Frank Scott of a

> marked difference of approach in reports and addresses of judges and practising lawyers from that adopted by the teachers and scholars. The former tend to stress the dangers to liberty that lie in the administrative tribunals, the latter emphasize the importance of the new functions of the state and the need for procedures swifter and more expert than those followed in the regular courts of law. [F.R. Scott, "Administrative Law: 1923-47" (1948) 42 Can. Bar Rev. 268 at 270.]

Gordon ignored both the issues of liberty and expertise and concentrated on conceptual clarity.

[92]Willis, "Three Approaches to Administrative Law", *supra*, note 85 at 66-67.

[93]U.K., Committee on Ministers' Powers, *Report*, *supra*, note 26 at 117.

[94]Gordon, "'Administrative' Tribunals and the Courts", *supra*, note 12 at 442.

[95]Willis, "Three Approaches to Administrative Law", *supra*, note 85 at 69-74.

[96]Willis feared from a policy perspective that:

> [Q]uestions of law are very difficult to distinguish from questions of fact, and to invite a court to rule upon questions of law is to invite them to take upon themselves the consideration of administrative policy of which they have no experience. [*Ibid.* at 79.]

On the other hand, Gordon expressed concerns from an adjudicative perspective:

> To say that a decision is unfair or arbitrary is simply to say it is unjust. ... It is only if a decision is unjust in the sense of being a denial of justice, i.e. a denial of

ately concerned with either adjudication or social welfare doubted the courts' ability to supervise administrative discretion, and could adopt a perspective on law as external limits safely apart from the administrative exercise of what, for Willis, was enlightened policy and, for Gordon, arbitrary will.

Attempts to reimpose a conceptual approach to jurisdictional review after the 1930s could not embrace Gordon's vision of adjudication as a logical science of self-executing principles. Writing a treatise in the early 1960s, Amnon Rubinstein shared Gordon's text-book ambition of bringing doctrinal clarity to jurisdictional review.[97] He agreed that courts and scholars should concern themselves with the definition of the "dividing line between the jurisdictional and non-jurisdictional" and hopefully contemplated defining "the gateway through which the tribunal must pass before reaching the safe grounds of his jurisdictional sphere and the shelter of his 'privilege to err'."[98] Unlike Gordon, however, Rubinstein concluded that such definitions could only be the result of a compromise reached between the consequences of the possible choices judges had to make. Legal concepts embodied conflicting policy choices. Gordon recognized that Rubinstein shared his ambition to rationalize the law, but criticized him for vagueness about whether supervising courts should consider whether a tribunal had erred in determining the actual existence of a jurisdictional fact or only in evaluating the reasonableness of the evidence available to it.[99] In the end, Gordon was more unsympathetic to Rubinstein's attempts to recognize and integrate the tension of purposes in the doctrine of jurisdictional review[100] than he was to de Smith's more simple surrender to the courts' expedient exercise of jurisdictional review. Gordon was more tolerant of judicial abdication to the world of discretion than he was to attempts to recognize the interests advanced by legal concepts and the need for choice between policy-driven concepts.

In the first edition of his text-book, de Smith paid homage to Gordon's conceptual logic before eventually dismissing Gordon's limited view of ju-

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> legal rights, that a Court of law can even weigh its deficiencies. [Gordon, "'Administrative' Tribunals and the Courts", *supra*, note 12 at 441.]

Gordon went on to argue that the law itself provided no criteria to identify considerations which were irrelevant to the exercise of administrative discretion.

[97]A. Rubinstein, *Jurisdiction and Illegality* (Oxford: Clarendon Press, 1965) at 194. Like Gordon, Rubinstein lamented the lack of clarity in the doctrine and related it to the absence of a text-book.

[98]*Ibid.* at 213.

[99]Gordon, Book Review (1966) 82 L.Q. Rev. 263 at 270. Gordon used his sense of categorical reasoning to argue that Rubinstein wavered between two "quite opposed" ideas of either making the actual facts or the evidence available to the tribunal determinative in jurisdictional review.

[100]Rubinstein sought to "strike a balance between the need for conclusiveness and the requirements of justice." [Rubinstein, *Jurisdiction and Illegality*, *supra*, note 97 at 217.]

risdiction as impractical. de Smith recognized that Gordon's absolute theory of jurisdiction embraced the virtues of both "logical consistency and finality",[101] but concluded that it would excessively fetter the ability of supervising courts to intervene when necessary:

> At bottom ... the problem of defining the concept of jurisdiction for the purpose of judicial review has been one of public policy rather than one of logic.[102]

Gordon, who warmly embraced the idea of a text-book in this confused and inconsistent field of jurisprudence, could not believe that he had won the logical battle, but lost the expanded policy war:

> Dr. de Smith agrees that the 'pure theory' or jurisdiction has logic, consistency and coherence on its side, though he finds an *apologia* for judges reverting to the idea of conditional jurisdiction on grounds of expediency, his reasoning throughout seems to imply that the justifications they offer are neither logical, consistent nor coherent.[103]

de Smith acknowledged the power of Gordon's conceptual arguments and was unable to explain the cases except by reference to the discretionary category of policy and expediency. Gordon, in turn, could live with such an explanation as a second best solution because it did not challenge his belief in the dichotomy between law and discretion.

As functionalism blossomed in the 1950s, the utility of jurisdictional fact review as perceived by earlier commentators such as Dickinson and Finkelman was recognized and defended more openly by mainstream thinkers. It was assumed that reviewing courts had the policy sophistication to know when to use the many means of review provided by the doctrine. For example, Louis Jaffe criticized Gordon's absolute theory of jurisdiction as "barrenly semantic"[104] because it paid no attention to the purposes of judicial review. Jurisdictional control should serve a functional purpose, and Gordon's theory was inadequate because it did not examine "the why and wherefor of the doctrine", but only relied on its internal "logical sufficiency".[105] Similarly, Geoffrey Sawer argued that judges never accepted Gordon's limited view of excess of jurisdiction and maintained "that the question is at bottom one of policy, not of logic."[106] Qualitative policy reasoning should determine decisions whether to find jurisdictional error

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[101]S.A. de Smith, *Judicial Review of Administrative Action* (London: Stevens, 1959) at 67.
[102]*Ibid.*
[103]Gordon, "Conditional or Contingent Jurisdiction of Tribunals", *supra*, note 20 at 193. See also Gordon, Book Review, *supra*, note 21.
[104]L.L. Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact" (1957) 70 Harv. L. Rev. 953 at 962.
[105]*Ibid.* at 963 n.38.
[106]G. Sawer, "Error of Law on the Face of An Administrative Record" (1954) 3 U. W. Aust. L. Rev. 24 at 34.

because courts supervised the reasonableness of the merits of a tribunal's ruling and not only the scope of authority asserted in it.[107]

Gordon's theories have attracted both opponents and proponents in contemporary debate, but contemporary commentators understandably do not share Gordon's conception of law. David Mullan's criticisms of Gordon's theory of jurisdiction ignore Gordon's outdated understanding of statutory interpretation, and assumptions about the ability of legislatures clearly to define objective limits on the scope of authority. Mullan argues that once Gordon accepts some form of jurisdictional review by the court

> the whole question of how far that inquiry should extend comes into focus and ... Gordon becomes involved in the problem of delineating questions affecting jurisdiction from those which do not.[108]

Gordon believed that true jurisdictional questions would emerge from properly worded enabling statutes. His belief ignored much of the thought about statutory interpretation even in his own time, but it harkened back to a Rule of Law vision of adjudication as an objective science.

Peter Hogg has used Gordon's theories to reject the Supreme Court's insistence on the jurisdictional nature of "preliminary" facts and the method of determining such facts, but Hogg justifies the tribunal's finality in functional terms and not in the logical or statutory terms which Gordon favoured. In the context of the *Bell* decision,[109] Hogg argued that the human rights tribunal should have the power to decide what residences are self-contained dwelling units because of

> the value of the agency's experience, knowledge and expertise and its familiarity with the purposes and policies of the regulatory scheme... .[110]

Hogg and other contemporary scholars do not believe, like Gordon did, that jurisdictional review is by and large a matter of statutory interpretation of the scope of a body's powers as defined in the enabling legislation.[111] Likewise, Hogg cannot accept Gordon's ideal vision of objective adjudication and his pessimistic vision of raw discretionary power. Instead, he

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[107] *Ibid.*

[108] D. Mullan, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada - A Mitigating Plea" (1972) 10 Osgoode Hall L.J. 440 at 443.

[109] *Metropolitan Life* v. *International Union of Operating Engineers*, [1970] S.C.R. 425, 11 D.L.R. (3d) 336, 70 C.L.L.C. 14,008; *Bell* v. *Ontario Human Rights Commission*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1.

[110] P. Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: *Bell* v. *Ontario Human Rights Commission*" (1971) 9 Osgoode Hall L.J. 203 at 214.

[111] R.A. Macdonald, "Absence of Jurisdiction: A Perspective", in Canadian Institution for the Administration of Justice, *Judicial Review of Administrative Rulings* (Montreal: Yvon Blais, 1983) at 179.

fills the "undistributed middle" with functional and policy considerations. Gordon would have eschewed such considerations as extra-legal and unnecessary in defining the jurisdiction delegated in the enabling statute, rightly or wrongly, to the human rights tribunal.[112]

Hogg also parts from Gordon's conceptual framework by criticizing the jurisdictional fact doctrine for ignoring questions of deference and not having "regard for whether the 'error' is serious or trivial, clear or arguable, within or without the special competence of the agency."[113] The questions of deference or degree of error would have been utterly irrelevant in Gordon's world of bright line limits and categorical concepts. Although Gordon rarely elaborated on how the scope of authority should be determined, he would have expected courts to impose what today would be termed a standard of correctness in enforcing the ascertainable limits established by the legislature in the words of the statute. Furthermore, appeal to the concepts of deference and degree of error would not have been necessary to reject the expansive jurisdictional fact doctrine used in *Bell* and *Metropolitan Life*. In *Bell*, the human rights tribunal should have had the power to decide what was a self-contained dwelling unit because the legislature had made its opinion determinative on the point; the tribunal had acted within its scope of authority by answering such a question. Jurisdiction could only have been lost if the tribunal had held that the rental accommodation was not a self-contained dwelling unit, but nevertheless proceeded to pronounce upon the claim of discrimination. Concerns about the possibility of final and unappealable orders derived from the decision are irrelevant sentiments which ignore the clear statutory language which grants the tribunal power. Similarly in *Metropolitan Life*, the governing statute made the Labour Board's opinion determinative as to who were union members. The correctness of their opinion and the method they used to arrive at it were beside the point as no pre-existing rights were involved. The courts should not have second-guessed the Board's admittedly subjective and arbitrary opinion as to how the question allocated to it should have been determined.

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[112]P. Hogg, "Judicial Review: How Much Do We Need?" (1974) 20 McGill L.J. 157 at 163. For example, Hogg demonstrated none of Gordon's faith in words as he argued:

> The meaning of statutory language (or any language for that matter) always depends upon its context. It will be rare indeed to find a term in a statute which does not draw some colour from the purposes and policies of the statute of which it is a part. Judges who are not familiar with those purposes and policies or with the expectations of those familiar with the field of regulation may give a term its 'standard legal meaning' or its 'everyday popular meaning' in ignorance of the technical or policy implications of their decisions.[*Ibid.*]

Gordon would not have placed the last two phrases in quotations; they were, for him, real concepts.

[113]P. Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: *Bell* v. *Ontario Human Rights Commission*", *supra*, note 110 at 216.

None of the commentators discussed above fully shared Gordon's understanding of law. Dicey and McRuer were more concerned than Gordon to champion review by ordinary courts and they were willing to sacrifice some internal doctrinal consistency to facilitate review. These two thinkers were, however, willing to embrace Gordon's understanding of adjudication and his stark contrast between law and discretion. Willis also flirted with the contrast of law and discretion, but he was motivated by a concern to resist judicial review and support the positive state rather than a concern to praise the objectivity and autonomy of law. Other commentators such as Dickinson and Rubinstein could not accept Gordon's understanding of adjudication and argued that judges should recognize that policy choices were inevitable in the practice of judicial review and should be influenced by an appreciation of the interests at stake. They tried to reform legal reasoning, but they recognized it could no longer be autonomous from social purposes and consequences. Gordon would have rejected the optimistic and confident functionalism of Willis, Finkelman and de Smith as based on relativistic and arbitrary judgments of policy. It is significant, however, that Gordon would have reacted with less hostility to their attempts to place jurisdictional review at the level of discretion than at the attempts of others to penetrate the inner logic of legal concepts and to make them more policy conscious.

V. Implications of Gordon's Thought: Past and Present

Gordon's work is significant from both historical and contemporary perspectives. Historically, it demonstrates that the vision of an objective, scientific and autonomous legal order associated with the Rule of Law or text-book tradition of legal thought did not necessarily have to be combined with a hostility to the administrative state and an imperialistic imposition of judicial review over governmental work. Gordon conceded much freedom to administrative bodies because he believed that their work did not involve the recognition of legal rights and that no principled and consistent grounds justified judicial intervention. On the issue of judicial review of administrative activity, Gordon not only parted company with Dicey,[114] Hewart[115] and McRuer,[116] but he did so on the basis of values that are closely associated with the Rule of Law vision. First, Gordon took the notion of Parliamentary

[114]Dicey at times relished in a rather unprincipled faith that "in some form or other the English courts will always find the means for correcting ... injustice." [Dicey, "The Development of Administrative Law in England", *supra*, note 54 at 151.] Gordon, of course, did not share the same concern about substantive justice as he valued the technique of law above all else. It was the technique of law which allowed courts to claim they were objectively discovering and applying pre-ascertained standards found in law.

[115]Lord G. Hewart of Bury, *The New Despotism* (London: Ernest Bein, 1929).

[116]J.C. McRuer, Ontario, *Royal Commission Inquiry into Civil Rights*, *supra*, note 65.

supremacy seriously and accepted that the legislature had deliberately not provided for ascertainable legal standards or appellate review. Within the Rule of Law tradition a tension existed between the admitted supremacy of Parliament and the courts' unique ability to interpret the law. Gordon did not seem to be concerned when the exercise of Parliamentary supremacy reduced the power of ordinary courts.

Second, Gordon built much of his case for non-intervention on the dichotomies between law and politics, and between adjudication and discretion which were fundamental to the Rule of Law vision. Tribunals which exercised administrative functions were mini-legislatures charged with open-ended considerations of what was politic and expedient in particular circumstances. No standards existed to govern such questions and the best any court could do would be to substitute its own subjective and arbitrary opinion. Despite this acceptance of discretion, Gordon stubbornly maintained a faith in government limited by law because of his belief that the scope of administrative authority could be clearly defined in enabling legislation and discovered and enforced by courts. Procedural review, if practised at all, was to follow statutory prescriptions and not be based on vague concepts of fairness or influenced by qualitative assessments of the merits of the decision.

Third, Gordon's understanding of adjudication as the objective recognition of pre-existing rights encouraged him to see the limitations of courts reviewing determinations based on vague standards of policy and efficiency. It is tempting to conclude that Gordon's use of the Rule of Law's epistemology and theory of adjudication unmasks the political agenda of many more closely associated with that mode of thought.[117] One of the shortcomings of the Rule of Law framework of categorical reasoning and its division of law and politics is the way it can disguise questions of fundamental values and be manipulated to achieve disparate ends.[118] For example, Rule of Law

[117]While accepting Dicey's assumptions about the nature of law, Gordon may have inadvertently done a better job than even Dicey's critics in demonstrating that Dicey was not only concerned with legality, but also with the notion "that public authorities ought not to have large powers" and if so, that it was "an opinion peculiar to a conservative Liberal-Unionist of the Victorian era, and ... not a legal doctrine at all." [W.I. Jennings, "The Report on Ministers' Powers" (1932) 10 Public Administration 333 at 342.]

[118]After an examination of his legal writings, I must admit that Gordon's politics remain for me largely a matter of conjecture, even mystery. At times Gordon let slip anti-statist and individualistic musings similar to those of Dicey. [See *supra*, note 57.] In his advocacy of wartime measures, Gordon was authoritarian. [See *infra*, notes 121-128 and accompanying text.] Gordon may have been aware of how often his doctrinal arguments would favour unfettered exercise of state power, but if this is so, he disingeniously built an elaborate conceptual structure and never articulated sympathy with the administrative state.

approaches provided effective rhetorical foundations for both Gordon's criticisms and Dicey's and McRuer's sanctioning of expansive judicial review.

Gordon reveals the contingency in legal thought in that he accepted (or rather ignored) the rise of administration without sacrificing a vision of law which was increasingly under attack. Changes in the intellectual allegiance of lawyers either to functionalist judicial review or an obstinate championship of all High Court review were not inevitable: Gordon represented one option of drawing the wagons around the legal enterprise and protecting its purity by abdicating much ground to politics. Dicey, Hewart and McRuer were very ambitious in their attempts to judicialize the administrative state, but even the moderates of the Committee on Ministers' Powers and the realists were more ambitious than Gordon to have the law supervise the exercise of administrative discretion. Gordon could not abide the fuzziness inherent in flexible or functional forms of review. If control could not be categorized, it had to be abandoned. The epistemology, if not the politics, of Rule of Law thinking could tolerate the exercise of unregulated administrative power within the increasingly expansive boundaries drawn either by enabling legislation or legislative refusal to vest rights in administrative regimes which were designed to allow the discretionary pursuit of the public interest.

Although his professional desires were to rationalize doctrine and develop principled distinctions in order to save law, Gordon left much room within administration for political considerations of the public interest. If one's objective was simply to stop judicial attempts to intervene and review administrative actions, Gordon's theories of jurisdiction and the distinction between administrative and judicial functions would still have much utility. Indeed, no less of an advocate of the administrative state than John Willis was prepared to use Gordon's arguments to his advantage. Administrative law has again come under criticism for its preoccupation with individual grievances and its inability to deal with issues of policy-making, collective consumption and democracy.[119] Gordon's analogy of administration with legislation is provocative and might be considered as a basis for reform today. First, however, it would be wise to examine some of the implications of this analogy.

Gordon's sharp distinction between administrative and judicial functions was used by some Canadian courts to repel attempts to review the administration of wartime controls. In *Re Brown*,[120] Robertson C.J.O., like

[119]P. McAuslan, "Administrative Law, Collective Consumption and Judicial Policy" (1983) 46 Mod. L. Rev. 1; A.C. Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 Mod. L. Rev. 293.
[120]*Re Brown*, [1945] O.R. 554 (C.A.).

Gordon, refused to inflate interests into rights and recognized the public and distributive, as opposed to the adversarial and corrective character of the administration of rent controls. Robertson held that the imposition of rent controls was not subject to judicial review because it did not involve the pre-existing rights of landlords or tenants, but the pursuit of the public interest.[121] An administrator was "not appointed to judge between the landlord and the tenant and to determine their respective rights, notwithstanding that his order might affect them."[122] The sharp distinction between matters concerning rights and the public interest was consistent with a faith in government to determine questions on grounds of the public interest even if that meant sacrificing the interests of individuals.

The fact that Gordon's understanding of administrative functions left much room for state activity is underlined by his defences of other more objectionable wartime measures. Gordon agreed with the Manitoba Court of Appeal in *Yasny* v. *Lapointe*[123] that the Secretary of State's power, under the *War Measures Act*, to ban publications which according to the Act "would or might be prejudicial to the safety of the State or the efficient prosecution of the war" was an administrative determination of policy not reviewable by means of *certiorari*.[124] Gordon also wrote in support of a ruling of the British Columbia Court of Appeal which held that a decision to detain a deserter for fifteen months was an administrative decision not subject to judicial review.[125] The majority of the Court was influenced by Gordon's definition of administrative functions and held that the decision was made on grounds of policy and expediency, and not as a matter of the adjudication of rights or the imposition of criminal liability.[126] A minority of the Court and an academic commentator criticized both the Court's and Gordon's reasoning as formalistic and suggested that the underlying liberty interest be recognized as the substance of the matter and be so protected.[127]

[121]"Surely the 'other side' in such a matter is not the tenant's side, but rather the public interest." [*Ibid.* at 566.]

[122]*Ibid.* at 568.

[123](1940) 48 Man. R. 56, [1940] 3 D.L.R. 204 (Man. C.A.).

[124]Gordon, Case Comment on *Yasny* v. *Lapointe* (1940) 18 Can. Bar Rev. 732.

[125]Gordon, Case Comment on *R.* v. *Pantelidis* (1943) 21 Can. Bar Rev. 421.

[126]*R.* v. *Pantelidis*, [1943] 1 D.L.R. 569, [1943] 1 W.W.R. 58 (B.C. C.A.) (cited to D.L.R.) at 573 *per* McDonald C.J. B.C. and at 579 *per* McQuarrie J.A. (directly citing Gordon).

[127]*Ibid.* O'Halloran J.A., in dissent, argued at 588:

> Clothed in the form of a Board of Inquiry and purporting to act as a Board of Investigation, the Board is nevertheless given a jurisdiction far beyond the powers ordinarily attached to Boards of that nature. For it is given power of punishment and imprisonment.

An anonymous academic commentator on *Pantelidis*, most likely the editor Caesar Wright or the young Bora Laskin who wrote the subsequent review, similarly criticized the formalism of allowing a decision concerning liberty to be conducted without safeguards simply because it was labelled "administrative". [Case Comment (1943) 21 Can. Bar Rev. 308.]

Gordon's arguments were not only the result of wartime fever;[128] at a conceptual level his blindness to liberty interests mirrored his earlier blindness to property interests.[129] Gordon believed the courts should leave public authorities alone if the latter had merely been given vague directions to do what was expedient, as opposed to recognize rights as defined in the statute. Courts were to intervene only to protect rights. Gordon even went so far as to say that the repressive detention case of *Pantelidis* was a "particularly apt case to demonstrate the impracticability of requiring administrative tribunals generally to follow curial methods."[130] The war brought out an authoritarian streak in Gordon, but his conceptual apparatus, at all times, was remarkably accommodating to the role of government to pursue the collective good.

Gordon would protect pre-existing rights recognized in statutes, but he did not expand this idea into a tension between the interests of the individual and the state which could be threatened by the discretionary exercise of power. He was careful not to entrench interests that might be affected by the exercise of discretion and he did not impose adversarial concepts on the exercise of discretion. For example Gordon, unlike the Committee on Ministers' Powers, had no trouble conceiving of the public as both party and judge to administrative proceedings. Adversarial concepts of bias did not apply because no rights were at stake.[131] Gordon was willing to accept administrative determinations of the public interest with infrequent judicial policing of the scope of duly constituted authority but not of the merits or effects of those policy decisions.

In the end, Gordon's thought can accommodate administrative determinations of the public good, but only by creating a divide between law

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[128]Gordon was sympathetic to the war effort and stated:

> I see nothing startling in the idea that tribunals, dealing with actions that bear directly on the war effort, should not be bound by the restrictions on courts. Indeed, I do not think the war could be carried on efficiently if they were. [Gordon, Case Comment on *R.* v. *Pantelidis*, *supra*, note 125 at 423.]

[129]See for example, Gordon, Case Comment on *R.* v. *London County Council*, *supra*, note 31. See also, *infra*, notes 40-43 and accompanying text.

[130]Gordon, Case Comment on *R.* v. *Pantelidis*, *supra*, note 125 at 422.

[131]See U.K., Committee on Ministers' Powers, *Report*, *supra*, note 26 at 78-9. For disagreement with the Committee's approach and an argument similar to Gordon's, see Willis' comments on the inapplicability of judicial concepts of bias to administrative activity. [J. Willis, ed., *Canadian Boards at Work* (Toronto: MacMillan, 1941) at 116-17.] Despite their different starting points, it is tempting to speculate that Gordon and Willis were unconsciously brought together on this point by a Canadian political culture which embraced the need for public power and a trust that public power was not an alien force to be limited by adversarial concepts of bias. On the other hand, the two thinkers may have been brought together by a common willingness to accept unfettered discretion with Gordon unwilling to compromise his vision of law and Willis sceptical about reforming the judicial process.

and politics and placing policy and discretion safely on the side of politics. In doing so, administrative determinations are placed beyond judicial evaluation and scrutiny even in cases of abuse and unreasonable error. Gordon cannot provide antidotes to the impoverished sense of the public and political in administrative *law* because his sense of the public is premised on the absolute split between politics and law. The two areas are as "unmergeable" as any of Gordon's concepts. Furthermore, the public interest is not distinct from the arbitrary exercise of will and as such is not an appropriate topic for legal debate and criticism.[132] If anything, Gordon's understanding of law and the hold it has had on the "logical conscience" of the profession has retarded attempts to accommodate the public interest in legal discourse. Gordon, like much of the legal profession, found it easier to accept occasional, and not so occasional, lapses into unfettered judicial and administrative discretion rather than to attempt to integrate the interests and purposes of both rights and public interests into legal reasoning.

If we should ever despair at our attempts to impose controls on the exercise of discretion in a qualitative and selective manner, or to come to accommodate both rights and public interest in judicial review, Gordon's analogy of administration to legislation remains ready to be developed on what is left of Parliamentary supremacy and the Rule of Law tradition. The promise of principles and consistency that Rule of Law thought holds out may have some residual allure for lawyers, but the chasm between law and politics that must accompany the promise is too great for all but the most optimistic of democrats and the most formalistic of lawyers.

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[132]Nonet has noted the relation between the impoverished role of law as only an external restraint on power and the Diceyean framework. [P. Nonet, *Administrative Justice* (New York: Russell Sage, 1969) at 3ff.] For a provocative account of the hold the external perspective could have on even those who championed the activities of the administrative state, see H. Janisch, "Bora Laskin and Administrative Law: An Unfinished Journey" (1985) 35 U.T.L.J. 557.